(2012) 04 MAD CK 0005

In the Madras High Court

Case No : Tax Case (Appeal) No. 975 of 2005

S. Jagatrakshagan APPELLANT

Vs

Dy. CIT RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:
Constitution of India, 1950 — Article 14
Finance (No. 2) Act, 1998 — Section 90

Citation : (2012) 04 MAD CK 0005

Hon'ble Judges : K. Ravichandra Baabu, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : Anita Sumanth, for the Appellant; T. Ravikumar, for the Respondent

Judgement

Chitra Venkataraman, J.—Tax case (appeals) are at the instance of the assessee against the order of the Tribunal by raising following

questions of law:

(1) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the benefit of declaration under the Kar

Vivad Samadhan Scheme is not available to the appellant in respect of the Departmental appeal in ITA No. 2015/Mad/1998 ?

(2) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the expenditure incurred by the appellant

by way of interest and allowed by the CIT(A) as wholly and exclusively necessary for earning the income subject to tax is not eligible to be

deducted in computing the income liable to tax ?

(3) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in concluding that the sum of Rs. 20,00,000 represents

the appellants income, while at the same time the interest which is allowed to be deducted by the CIT(A) in computing the aforesaid income is not

liable to be deducted ?

The facts in brief are as follows:

The assessee herein opted for the benefit of Kar Vivad Samadhan Scheme and accordingly filed an application by offering income at Rs.

24,33,687. By proceedings dated 17-6-1999, the CIT, the designated authority passed an order in terms of s. 90 of the Finance (No. 2) Act,

1998 treating the final settlement of tax arrears at Rs. 5,88,684. It is a matter of record that in respect of interest payment of Rs. 20 lakhs, which

was referable to a loan taken from the bank, which was utilised for the purposes of investment in a company promoted by the assessee, was

sought to be disallowed by the AO.

2. The assessee herein, an individual promoted a company by name M/s. Sugantham Sugars Ltd. The shares therein were subsequently sold to

Prudential Mouli Sugars Ltd. On the question as to the returns on the sale of shares, M/s. Prudential Mouli Sugars informed that apart from refund

of share deposits, a sum of Rs. 20 lakhs was paid towards the services rendered by the assessee in connection with the promotion of the

company. The books of accounts of the assessee showed the receipts of Rs. 1,26,39,905 by way of cheque and a sum of Rs. 12,35,000 through

cash. Out of Rs. 1,26,39,979 a sum of Rs. 99,77,000 represented share deposit refund, Rs. 20,00,000 towards service charges, Rs. 6,55,000

towards payment to third parties and Rs. 13,905 towards expenses. The assessee offered no explanation as to the sources for the expenditure of

Rs. 12,35,000 and Rs. 13,905. This was hence added as income from business/ profession. The assessees total income was arrived at accordingly.

Aggrieved by this, the assessee went on appeal before the CIT(A). The assessee contended that he had borrowed money from the bank for

acquiring shares of Sugantham Sugars Ltd. and had paid bank charges therein. As the money was used for obtaining the shares, the interest and

other charges paid to the bank should be allowed as a deduction in the computation of income offered at Rs. 20 lakhs, it being the amount

received for rendering services. The said issue was considered in the assessment to the extent of Rs. 7,01,079 for the asst. yr. 1993-94. The

CIT(A) agreed with the assessee that the interest paid to the bank for investment in shares was merited to be considered for deduction. The

CIT(A), however, directed the officer to compute the actual interest paid to the bank and deduct the same from the taxable income. Any other

receipt by way of refund on interest was to be taxed in the year of such receipt. However, on the other issues, the CIT(A) granted partial relief.

The order of the CIT(A) was however appealed against by the assessee and by the Revenue too. As far as the assessees appeal is concerned in

IT Appeal No. 2034 of 1998, he objected to the addition made in respect of foreign trip, addition on the expenses incurred through credit card,

reimbursement of expenses of Rs. 12,46,965 and the remand made on the deduction claimed on the interest payment made to the bank as against

the receipt of Rs. 20 lakhs towards service charges. The Revenue preferred an appeal to the Tribunal in ITA No. 2015 of 1998 on the claim on

the interest payment to the bank on the money borrowed for the purpose of investment in Sugantham Sugars Ltd. The Revenue contended that the

investment of the borrowed funds was in non-income earned assets and hence, the corresponding interest could not be allowed. In any event, if

interest was to be allowed, it should be only Rs. 7,01,079.

3. As far as the appeal preferred by the assessee was concerned, considering the offer made by the assessee under the KVSS, 1998, nothing

remained for the Tribunal to proceed further with the assessees appeal and the same was withdrawn by the assessee. As regards the Revenues

appeal before the Tribunal was concerned, the assessee took a specific stand that after the determination of the tax payable under the KVSS,

nothing survived in the Revenues appeal for the Tribunal to pass orders on merits. In making such a contention, the assessee placed reliance on the

decision of the apex Court reported in Killick Nixon Ltd., Mumbai Vs. Deputy Commissioner of Income Tax, Mumbai and Others, , wherein it

was held that once on the declaration made the assessee had made the payment of the tax amount as determined u/s 90, the assessee enjoyed the

immunity u/s 91. In the circumstances, it was no longer open to the Tribunal to deal with the Revenues appeal on merits. However, the Tribunal

rejected the case of the assessee and pointed out that as on the date of the furnishing of the application under KVSS, the Revenues appeal was

pending before the Tribunal. The assessee did not verify the pendency of the

Department appeal. As the income involved in the Revenues appeal

was not the subject-matter of the declaration made by the assessee, the question of Revenues appeal automatically coming to end on the

determination u/s 90 of the KVSS would not arise. Aggrieved by this, the assessee is on appeal before us.

4. Placing reliance on the decision of the Delhi High Court in All India Federation of Tax Practitioners Vs. Union of India and Others, , wherein the

proviso to section 92 was struck down and the clarification issued on 17-12-1998 accepting the said decision, learned counsel referred to the

decision of the Karnataka High Court in Bhawaralal (HUF) Vs. Assistant Commissioner of Income Tax, also referred to the circular issued by the

Central Government in clarification bearing No. 149/152/1998-TPL dated 17-12-1998 ((1999) 151 CTR (St) 5)\and submitted that when once

the designated authority determined the tax payable by the assessee notwithstanding the apparent failure in not including the amount involved in the

Revenues appeal and the mistake in not including the same attributable to Revenues own lapse, the declaration could not be found fault with so as

to leave the Revenues appeal to be continued before the Tribunal.

5. Laying stress on the decision of the Apex Court reported in Killick Nixon Ltd. v. Dy. CIT (supra), learned counsel pointed out that once

declarant makes payment of the amount determined u/s 90, immunity u/s 91 springs into effect. Thus, reading in the context of Killick Nixon Ltd. v.

Dy. CIT (supra) as well as All India Federation of Tax Practitioners vs. Union of India (supra), the question of further dealing with the Revenues

appeal by the Tribunal does not arise for the Revenue to contend that the pendency of the appeal would not come to an end by reason of the

certificate issued in the declaration made by the assessee under the KVSS.

6. Countering the said statement of the assessee, learned counsel for the Revenue pointed out that the clarification given on 17-12-1998 after the

decision of the Delhi High Court clearly pointed out that the embargo to proceed with the appeal on the certificate issued on the declaration would

arise only in those cases of cross-appeals dealing with the selfsame issues before the appellate authority and that when the declaration filed by the

assessee evidently did not include the issue raised in the appeal filed by the Revenue, it is not open to the assessee to contend that on the determination of the amount payable u/s 90, the appeal filed by the Revenue would not be available for further proceeding thereon on merits before

the Tribunal. In the circumstances, there could be no inhibition on the part of the Tribunal to get along with the appeal on merits.

7. Heard learned counsel for the appellant as well as learned standing counsel for the Revenue.

8. Before going into the various contentions raised in the appeal, the provisions relating to the time and manner of payment of tax arrears, the effect

of the declaration and the order made on the pending appeal as provided u/s 90 and 92 of KVSS, 1998, need to be seen. The said provisions

read as follows:

90. Time and manner of payment of tax arrear.-(1) Within sixty days from the date of receipt of the declaration u/s 88, the designated authority

shall, by order, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form

as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full

and final settlement of tax arrears:

Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be

presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the

proceedings against the declarant are or were pending shall be deemed to have been revived:

Provided further that the designated authority may amend the certificate for reasons to be recorded in writing.

(2) The declarant shall pay, the sum determined by the designated authority within thirty days of the passing of an order by the designated authority

and intimate the fact of such payment to the designated authority along with proof thereof and the designated authority shall thereupon issue the

certificate to the declarant.

92. Appellate authority not to proceed in certain cases.-No appellate authority shall proceed to decide any issue relating to the disputed

chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear specified in the declaration and in respect of which an order had been made u/s 90 by the designated authority or the payment of the sum determined under that

section:

Provided that in case an appeal is filed by a Department of the Central Government in respect of such issue relating to the disputed chargeable

expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear (except where the tax arrear

comprises only penalty, fine or interest), the appellate authority shall decide the appeal irrespective of such declaration.

9. A reading of the said provision shows that once an order has been made on the declaration filed, there is a total ban on the hearing of the appeal

on any issue covered under the declaration. However the proviso made an exception in respect of the appeal filed at the instance of the Revenue

that such declaration would not have any effect on the hearing of the Revenues appeal. Dealing with the vires of the proviso thus making an

exception to the Revenues appeal, in the decision reported in All India Federation of Tax Practitioners v. Union of India (supra) Delhi High Court

held that the proviso to section 92 of the Finance (No. 2) Act, 1998 is ultra vires Art. 14 of the Constitution as it results in creating two artificial

classes between the same class of assessees, i.e. the litigating assessees in arrears and the definition of tax arrears in clause (m) of section 87 of the

Finance (No. 2) Act, 1998, particularly with reference to the appeal filed at the instance of the Revenue pending before the appellate forum. The

Delhi High Court pointed out that the proviso to section 92 of the Finance (No. 2) Act, 1998 results in creating two artificial classes between the

same class of assessees, one being appellant in the appeal before the appellate forum and other being the assessee as respondent in the

Departments appeal. The Delhi High Court read down the proviso contained in section 92 and pointed out that no sub-classification could be

made in the class of litigating assessees. Once a liability to pay the tax was incurred and determined on or before 31-3-1998, the assessee would

be treated to be in arrears in spite of his having succeeded at one stage of the litigation if the Revenue has chosen to continue with the litigation and

there is no reason why the benefit of the scheme should be denied to him. To this extent, the scheme is discriminatory and violative"" of Article 14 of the Constitution. Pointing out that all the assessees litigating and in arrears belong to one class, the Delhi High Court held that any attempt at carving

out further classes by reference to who is the prosecutor/appellant/applicant in the pending litigation is void as based on no intelligible differentia.

The provisions apart from being arbitrary, irrational and evasive, have no rational relation to the object sought to be achieved by the Act.

10. Admittedly, the said decision of the Delhi High Court was accepted by the Revenue. The CBDT ultimately passed a clarification dated 17-12-

1998 in F. No. 149/145/1998-TPL ((1999) 151 CTR (St) 4), which reads as under:

Kar Vivad Samadhan Scheme

Your attention is invited to the judgment dated 17-11-1998 (reported as ALL INDIA FEDERATION OF TAX PRACTITIONERS Vs.

UNION OF INDIA by Hon''ble Delhi High Court in the above case and the Press Release issued by the Government conveying the acceptance

of the judgment by Central Government. A copy of the above Press Release has already been sent to you along with DO Letter No.

142/44/1998-TPL dated 1-12-1998 from Member (L).

2. Following the above judgment of Delhi High Court, the Government has decided that the assessees who want to make declaration under KVSS

in respect of taxes involved in the appeals filed by the Department can do so. Such declarations shall be regulated as under:

(i) The assessee has the option of filing declaration either in respect of arrears disputed in his appeal or of taxes involved in Departmental appeal or

for both independently of each other.

(ii) For declarations relating to Departmental appeals also the existing Form No. IA can be used. In such cases, there are no outstanding taxes and

hence the process of working out disputed income from outstanding ''taxes is not involved. The entire income under dispute in various grounds of

appeal may constitute dispute income on which the sum payable can be determined. In respect of Departmental appeals, the declaration has to be

for the entire income disputed in such appeals.

(iii) Where the declarations in respect of Departmental appeals are accepted by the designated authority, the CIT may proceed to withdraw such

appeals on passing of the order under s. 90(2).

(iv) In the event of cross-appeals on same issue, if the assessee does not opt to declare in respect of taxes involved in Departmental appeals, the

provisions of section 92 would not apply as these place bar only in respect of issue covered in the declaration in respect of which order u/s 90 has

been passed. This will also be the position, if the assessee does not opt for declaration in respect of other Departmental appeals. The appeals in all

such cases should not be withdrawn.

3. The designated authorities working under your region may kindly be informed accordingly.

11. The said clarification was considered by the Karnataka High Court in the decision reported in Bhawaralal (HUF) vs. Asstt. CIT (supra). The

assessee therein made a declaration to avail the benefit of the scheme under KVSS, 1998 u/s 88 and paid the tax determined by the CIT. At that

time, the assessees appeal as against the order of the CIT(A) on the disallowed cost of construction, character of the rent and the receipt from the

tenant was pending in appeal before the Tribunal against the portion of the CIT(A)s order granting relief to the assessee. the Revenue also had

gone on appeal before the Tribunal. Evidently, while determining the arrears payable by the assessee as per section 90, the CIT did not take into

account the dispute involved in the Revenues appeal before the Tribunal. On the question as to whether the assessee has to file two declaration

forms, the Karnataka High Court considered the decision of the apex Court reported in Killick Nixon Ltd. v. Dy. CIT (supra) as well as All India

Federation of Tax Practitioners v. Union of India (supra) and the clarification issued by the Board and pointed out that when the assessee had filed

its declaration, admittedly, the appeal by the Revenue was also pending. Hence, the determination by the designated authority on the tax arrears

would necessarily have to take into consideration the issues involved in the assessees appeal such arrears including what was raised in dispute by

the Revenue by way of an appeal. The Karnataka High Court further pointed out that a duty was cast on the designated authority to arrive at the

correct amount payable by the declarant, notwithstanding that the declaration might not have included the tax arrears in dispute which was sought

to be raised by way of an appeal by the Revenue. The High Court pointed out:

.... The determination by the designated authority of the tax arrears would necessarily have to take into consideration such arrears including

what was raised in dispute by the Revenue by way of an appeal. This was a duty cast on the designated authority notwithstanding that the

declaration may not have included the tax arrears in dispute which was sought to-be raised by way of an appeal by the Revenue. It was open to

the designated authority to have called upon the assessees to avail the benefit of settlement only if all tax arrears, including those which are disputed

by the Revenue and which are pending in appeal as on the date of such determination, are paid...............

12. The Karnataka High Court pointed out that it was open to the designated authority to call upon the assessees to avail the benefit only if all tax

arrears including those issues which are disputed by the Revenue, which are pending in appeal as on the date of such determination are paid. Thus

section 90 requires the designated authority to determine the amount payable in accordance with the provisions of the Scheme and the sum

payable after such determination towards the full and final settlement of the tax arrears. Upon payment of such amount determined under s. 90(1),

it is conclusive and the Scheme could not be reopened. Once: determination is made, failure to include the dispute raised by the Revenue in its

appeal being attributable to the Revenues own lapse, the same cannot be put against the assessee for the purpose of proceeding further with the

appeal filed before the Tribunal. Thus, the Karnataka High Court held:

.... The Revenue having failed to do so in the present case and having issued a certificate of the tax arrears for the assessment year,

notwithstanding the apparent discrepancy, insofar as the tax arrears in relation to the dispute sought to be raised by the Revenue in its appeals, was

not part of the said declaration, is attributable to the Revenues own lapse and hence, there is no substance in the contentions put forth by the

Revenue.

13. In the context of the said decision, with which we agree, the fact remains herein today that when once the designated authority passed an order

on 17-6-1999 determining the tax payable at Rs. 5,88,684, the order thus determining the final sum payable by the assessee in respect of the tax

arrears is conclusive. It is so irrespective of whether the dispute raised by the Revenue in its appeal is included in its offer or not, as pointed out by the Karnataka High Court, a duty is certainly cast upon the Revenue to consider the entirety of the case to arrive on the final determination. If the

Revenue failed to do so, as stated by the Karnataka High Court, the Revenue has to suffer for its own lapse. On that score, the assessee could not

be faulted on the amount determined as per section 90.

14. Learned counsel for the assessee pointed out that as on the date of filing of its application under the KVSS, admittedly, no notice was served

on the assessee as regards the pending Revenues appeal before the Tribunal. Even when the order was passed u/s 90 of the KVSS, the appellant

had no knowledge about the pendency of the appeal. We hold irrespective of whether the assessee had knowledge or not, when once the amount

payable by the declarant in accordance with the provisions of the Act was determined by the designated authority, viz., the CIT, it amounts to the

Department having bestowed its attention to the entirety of the tax arrears to pass order u/s 90. Thus as held in the decision of the Karnataka High

Court that once final determination is made, further hearing on any pending appeal before the appellate forum for passing order on merits is not

possible. Even as per section 90 of the KVSS, only where the declaration furnished by the assessee is found to be false by the designated authority

at any stage, all the proceedings against the declarant shall be deemed to have been revived, thus enabling the designated authority to amend the

certificate for reasons in writing. In the absence of any such situation arising herein, the Revenue cannot sustain its plea that irrespective of

determination made u/s 90, the appeal would nevertheless be kept, treating as one pending for further consideration at the hands of the Tribunal.

15. It may be of relevance to note that the assessees declaration was accepted and the amount payable was determined by the CIT in his

proceedings dated 17-6-1999. The said order was despatched on 15-7-1999. A perusal of the file produced shows that the Revenues appeal

before the Tribunal was filed on 7-7-1999, by which time, the Samadhan Certificate had already been made.

16. Going by the above facts and further pointed out by the apex Court in the decision reported in Killick Nixon Ltd. v. Dy. CIT (supra), once

determination is made u/s 90 towards full and final settlement of tax arrears, there is nothing to be treated as pending for final consideration before any authority which includes the Tribxinal. In the result, the order of the Tribunal is set aside. The substantial question of law is answered in favour

of the assessee and against the Revenue. No costs. Consequently, connected TCMP is closed.

